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No. 85-2130

In The
Supreme Court of the United States
October Term, 1986

ROBERT W. AKERS;
CALIFORNIA CATTLEMEN'S ASSOCIATION;
CALIFORNIA FARM BUREAU FEDERATION; and
NATIONAL CATTLEMEN'S ASSOCIATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF TO GOVERNMENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On August 26, 1986, the government served its opposition to the petition of Robert Akers and intervenor-defendants for writ of certiorari in this case. In that opposition the government advanced arguments based upon a fundamentally flawed understanding of the congressional intent and plain language behind the agricultural exemptions to the Clean Water Act, 33 U.S.C. § 1344(f). This misunderstanding is not only contrary to the intent of Congress, but also defies common sense.

I

"NORMAL FARMING" AS USED IN THE AGRICULTURAL EXEMPTION MEANS NORMAL FARMING AS THAT TERM IS COMMONLY UNDERSTOOD, AND INCLUDES ALL THE ACTIVITIES ENGAGED IN BY MR. AKERS

In trying to explain away the intent behind the normal farming exemption to the Clean Water Act, 33 U.S.C. § 1344(f)(1), the government attempts to give that term an absurdly narrow construction. It has never been disputed that Mr. Akers intended to grow anything but normal crops, specifically wild rice or upland cereal grains, in any way but a normal and accepted manner. Yet the government denigrates Mr. Akers' plans, and misstates his argument, by stating that "petitioner construes the exemption [to apply to] an activity that can plausibly be called 'farming'—regardless of how novel the use of the land is . . . . " Opposition Brief at 8. There is nothing at all "novel" about Mr. Akers' actual or proposed farming activities. The growing of wild rice and cereal grains has constituted "normal" farming for millennia. Thus whether or not the area had ever been the site of "upland" farming is not particularly relevant to the question of whether the proposed farming activities of Mr. Akers are "normal" farming. Surely wild rice and/or cereal grain farming is normal, and not novel, in the modern era of Twentieth Century farming.

The government next claims that the normal farming exemption should not apply because "even petitioner concedes that his reconstruction work will 'intensify' the established farming use of the property." Opposition Brief at 8. First petitioners are heartened that the government

recognizes that at least some of what Mr. Akers has been attempting to do with his property in "reconstruction," revealing again that the activity is normal and not "novel." Second, this assertion by the government raises a curious question of its own. Since when it is not "normal" for a farmer to intensify a farming operation? Modernization of a farming operation is absolutely essential to any farmer who wishes to stay competitive in today's extremely difficult market. The government would have every farmer who operates on or near wetlands be trapped forever in the early Twentieth Century. This is wrong; farmers must have the ability to compete, and to do this they must have the complete ability to modernize without interference from the Army Corps of Engineers (Corps). This is precisely what Congress intended when it passed the exemption. The government's notion that normal farming does not include intensification or modernization must be rejected.

The government also argues that anything but "moderate uses" fall outside the exemption as do "farming uses never before applied to the land." Opposition Brief at 9, 9 n.4. Neither Congress nor the regulations ever placed a "moderate" limitation on the normal farming exemption. Outside of mining, farming is one of the most intense uses of land possible. To suddenly limit the permissible range of normal farming uses to "moderate uses" is contrary to any commonsense definition of either the word farming or normal. Similarly, there can be found nowhere in the statute, regulations, or congressional debate any reference to the government's notion that "uses never before applied" fall outside the scope of the exemption. Again the government would forever tie farmers to

only those farming methods used only at the present moment, without any ability to modernize, intensify, or alter those uses without first running to the Corps for a permit.[1]

II

THE GOVERNMENT'S CRABBED DEFINITION OF "NORMAL FARMING" IS UNSUPPORTED EITHER BY CONGRESSIONAL INTENT OR LEGAL PRECEDENT

The government contends that because "petitioners do not suggest that the regulation in any way conflicts with the intent of Congress," Opposition Brief at 11, and that because the decision of the court below was "fact-bound," *id.*, the opinion below must be upheld. The basis for this logic is remarkably strained and misleading. While the regulation itself is clearly not a subject of challenge in this case, the legal issues surrounding its interpretation most certainly are.

As explained in the opening petition, the agricultural exemptions were passed by Congress to free farmers from the regulatory morass threatened by the Army Corps of Engineers. *See, e.g.,* Akers' petition at 13-20. While the Senate and House balked at suggestions to remove all wetlands from Corps' jurisdiction, they did pass exemptions that undisputably apply to active ongoing farming

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[1] It should be noted that the government's reference to the permit system as the key to the elimination of "water pollution" is rather misleading in this context. Opposition Brief at 10 n.5. Farming in general, and Mr. Akers' farming in particular, cannot seriously be considered as "pollution." The permit system applies to farming only in the context of the filling in of wetlands, not to the primary thrust of the Federal Water Pollution Control Act, which was to abate water pollution as that term is commonly understood.

operations, and this intent is reflected in the regulations where reference is made to "ongoing" operations. 33 C.F.R. § 323.4(a)(1)(ii) (1985). However, the government's interpretation of those regulations is unsupportable. Nowhere in the statute, regulations, or congressional history can any support be found for the belief that any type of active and ongoing farming operation is not protected by the exemptions. Nor does the so-called "recapture provision," 33 U.S.C. § 1344(f)(2), serve to delete any active and ongoing operation from the exemption. Rather, it applies only to attempts to convert nonfarming uses into farming uses, or vice versa. There is absolutely no legal or historical justification for the government's purported distinction between farming uses of one sort versus those of another. The mere conversion of one crop to another, with whatever irrigation changes and reconstruction that are necessary, is not such a new use for which the recapture provision can be invoked.

All of the cases cited by the government are of no avail to its argument. In *United States v. Huebner,* 752 F.2d 1235, 1240-41 (7th Cir. 1985), *cert. denied,* — U.S. —, 88 L. Ed. 2d 50 (1985), the defendant attempted to convert land that had not been farmed in decades into farmland and to convert inoperable irrigation ponds into dry land. In Akers' case the subject land has been actively and continuously farmed since the turn of the century.[2] The case of *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 926 (5th Cir. 1983), provides even less support to the government's argument. There the

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[2] It should be noted that the record below demonstrates that the property has also been drained at the end of every year to provide for mechanized harvest.

land had never been used for farming and the defendant attempted to clear stands of hardwood wetland forest to make his property suitable for farming.

The government notes with approval that the court below "expressly held that the applicability of the recapture provision depends upon 'the substantiality of the impact on wetland.'" Opposition Brief at 12. But how is this "substantiality" to be determined? Only by running to the Corps for it to make that factual determination. And this is precisely what is wrong with the government's interpretation of the agricultural exemption and its limitation of the term "normal farming" to something narrower than any rational or logical meaning. Congress intended to free farmers from the specter of bureaucratic interference with their day-to-day decision making processes. Yet the government argues that the Army Corps of Engineers must become every farmer's comanager to determine what can and cannot be done on a farm, with or without a permit, whenever some wet land may be "substantially" affected.[3] If the farmer acts without consulting with the government comanager, it is at the farmer's peril because the penalties under the Clean Water Act can be severe. Surely this is an unsupportable state of affairs

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[3] The government asserts that the court's decision protects rotations among wetland crops from excessive regulation. Opposition Brief at 7. Yet if a farmer wishes to convert from wetland wild hay cultivation to wetland wild rice cultivation, and the "hydrological regime" were to be affected, which is not an impossible scenario under certain circumstances, then the Corps could very well have permit jurisdiction under the government's reading of the decision. And even by the government's argument a crop rotation from meadow hay to a cereal grain most certainly would invoke the direct regulation by the Corps.

and one clearly not envisioned by Congress and not supported by any existing case law.

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CONCLUSION

For the foregoing reasons this Court should grant Akers' Petition for Writ of Certiorari.

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Respectfully submitted,

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